

FILED

October 6, 2004

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of:

LEONARD S. PAPEL, D.O.

FINAL DECISION AND
ORDER

This matter was returned to the Board of Medical Examiners (the "Board"), pursuant to N.J.A.C. 17:27-18.6, following the entry of a 107 page Initial Decision dated July 1, 2004 in the above captioned matter (to which two appendices were attached) by Administrative Law Judge Diana C. Sukovich. Within her Initial Decision, Judge Sukovich made extensive findings of fact based on testimony presented and documents introduced into evidence during a three day hearing which was held on March 13, 14 and 17, 2003. Judge Sukovich ultimately concluded that cause existed to support findings that respondent Leonard S. Papel had engaged in extensive wrongdoing, to include engaging in dishonesty, fraud, misrepresentations and deceptions, gross and repeated negligence and malpractice, professional misconduct and lack of good moral character. Based thereon, Judge Sukovich recommended that the Board revoke the license of responder to practice medicine and surgery in New Jersey, assess a civil penalty in excess of \$200,003, assess investigative and other costs, to include attorney's fees, incurred

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in the prosecution of this matter and require Dr. Papel to reimburse certain defrauded insurance carriers.¹

Both parties filed written exceptions to the Initial Decision. Respondent Papel, by letter from counsel Robert D. Zatorski, Esq. dated July 19, 2004, took exception to "all findings of fact, conclusions of law and dispositions adverse to the position of the Respondent." Respondent also took exception to the penalties recommended by ALJ Sukovich as being "contrary to the facts as presented at the hearing and the law governing thereto." Deputy Attorney General Joan D. Gelber urged, in a letter dated July 23, 2004, that we adopt the "overwhelming majority" of the recommended findings of fact and conclusions of law within the Initial Decision, but nonetheless took exception to certain adverse rulings made by ALJ Sukovich, suggested that ALJ Sukovich had miscalculated the total amount of financial penalties which should be assessed and urged that we make a series of minor "clerical" corrections to the Initial Decision.:

1. We make no attempt herein to summarize or otherwise restate the extensive discussion of the hearing or the findings of fact made based thereon within ALJ Sukovich's Initial Decision. we instead, for the reasons set forth above, adopt the Initial Decision in its entirety (subject to the limited modifications set forth above), and we append that decision hereto and incorporate it herein by reference.

2. The Attorney General took substantive exception to the following four conclusions reached by ALJ Sukovich:

- 1) that Dr. Papel's failure to produce subpoenaed medical records did not constitute a violation of N.J.A.C. 13:35-6.5;

This matter was scheduled for oral argument before the Board on September 8, 2004. Although respondent filed written exceptions, Mr. Zatorski submitted a letter dated August 23, 2004 wherein Dr. Papel specifically waived his opportunity to appear before the Board and present oral argument to the Board at the hearing. Accordingly, only the Attorney General, by Deputy Attorney General Joan D. Gelber, appeared before the Board on September 8, 2004. D.A.G. Gelber then presented limited oral argument urging the Board to reject Dr. Papel's exceptions to the decision, and to modify the decision in the limited ways she had urged in her filed exceptions.

Initially, we are constrained to note that respondent's global exception to "all adverse findings" made by the ALJ clearly fails to conform with the requirements of the Uniform Administrative Procedure Rules. N.J.A.C. 1:1-18.4 requires, *inter alia*, that exceptions to any specific findings of fact describe and reference those portions of the record (whether testimony or documents in evidence) relied upon to support any given exception, and that exceptions to conclusions of law set forth the authorities relied

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- 2) that Dr. Papel's use of the designation "C.A.B.R." did not constitute a violation of N.J.A.C. 13:35-6.1;
 - 3) that Dr. Papel's use of the designation "M.D., D.O." did not constitute a violation of N.J.A.C. 13:35-6.1; and
 - 4) that Dr. Papel's preparation of verbatim and false treatment summary reports did not constitute gross malpractice.

upon. We are thus left unable to discern, from respondent's cursory submission, any specific factual findings that respondent takes issue with, nor the specific testimonial or documentary basis for respondent's exceptions.

Notwithstanding respondent's failure to submit exceptions in a manner consistent with administrative rules, however, in this case we find that the proposed findings of fact made by ALJ Sukovich in her extensive decision are firmly rooted and amply supported by the testimony and documentary evidence in the record below. We therefore find no basis to disturb any of the proposed findings of fact made in ALJ Sukovich's detailed Initial Decision, and we adopt the proposed findings of fact within the Initial Decision in their entirety, subject only to the limited modifications set forth in Appendix "A" hereto,³

Further, we have reviewed the legal arguments advanced by respondent in his "post-hearing brief" (which brief was appended to his one page letter of July 19, 2004), to include his argument that the standard of proof on the fraud charges in the complaint should have been by "clear and convincing evidence" rather than by a "preponderance of the evidence", and his argument that the state failed to produce competent and probative expert testimony based

³ Within his filed exceptions, the Attorney General urged that we make certain minor "clerical" corrections to certain statements in the body of the Initial Decision. Respondent did not oppose the Attorney General's suggestions, and we thus herein adopt the proposed changes. We do not consider any of the changes made in Appendix "A" to be substantive.

upon a reasonable degree of medical probability. We reject respondent's legal arguments for the same reasons advanced by ALJ Sukovich in her Initial Decision (at pages 94-95): see also Matter of Ming 2. Chang, M.D., Appellate Division Docket A-592-02T3 {decision May 13, 2004}.

Turning to the exceptions raised by the Attorney General, we are satisfied that cause exists to modify three specific Conclusions of law reached by ALJ Sukovich in her opinion. First, and most significantly, we specifically conclude that Dr. Papel's preparation of thirteen identical final narrative reports for thirteen distinct patients was conduct which constituted gross malpractice, and thus provides independent basis for disciplinary action against Dr. Papel pursuant to N.J.S.A. 45:1-21(c).

ALJ Sukovich found in her Initial Decision that Dr. Papel issued thirteen narrative reports for thirteen distinct patients listing purported "significant physical findings on initial examination" regarding the cervical and lumbar spine area and purported physical findings at the time of the last patient visit, which reports were verbatim for each patient. Significantly, the findings reported for each patient were found to be different than the actual findings documented in Dr. Papel's charts, and were further found not to have any basis in reality.

We conclude that, by preparing false and misleading reports, which included affirmative representations of purported

physical findings which were not true, Dr. Papel placed his patients at substantial if not grave risk. We point out that subsequent treating physicians would have likely reviewed Dr. Papel's records and likely have based treatment decisions for individual patients upon the fraudulent data therein, which in turn could have had substantial adverse ramifications for individual patients. We are unanimously of the opinion that Dr. Papel's preparation of said reports constituted gross malpractice and endangered the future health and safety of his patients. We also reject and modify A.L.J. Sukovich's determinations that Dr. Papel's use of credentials "D.A.B.R." and "M.D./D.O." did not constitute violations of N.J.A.C. 13:35-6.1. A.L.J. Sukovich found that:

Respondent signed radiology reports as "Leonard S. Papel, D.A.B.R." It is "very clear" that the designation references "DIPLOMATE ... American Board of Radiology. Papel's signature designation of "D.A.B.R." connoted "Diplomate of the American Board of Radiology", in the context of a subsequent line, which read "radiologist."

...

For "a period of time", Papel utilized the designation "M.D.", followed by "D.O...." Respondent removed that designation from his prescriptions after the State Attorney General's office "questioned" whether he had the "credentials" to support such.

Initial Decision at page 9: transcript and evidence references omitted.

It is thus clear that ALJ Sukovich made factual findings that respondent used designations -- namely, "D.A.B.R." and "M.D." -- the only purpose of which could have been to convey that he

possessed academic credentials and Board certifications which he did not in fact possess. Dr. Papel clearly did not graduate from an A.M.A.-accredited allopathic professional school, and thus knew or should have known that he did not possess an "M.D." degree. Similarly, Dr. Papel was clearly not board certified in radiology by the American Board of Radiology, and thus knew or should have known that his use of the designation "D.A.B.R." was a misrepresentation of his professional status. The above conduct is clearly prohibited by N.J.A.C. 13:35-6.1, and we thus determine that A.L.J. Sukovich's factual findings support a conclusion that Dr. Papel violated the strictures of N.J.A.C. 13:35-6.1.

Finally, we reject the Attorney General's exception to A.L.J. Sukovich's determination not to find a violation of N.J.A.C. 13:35-6.5 because Dr. Papel failed to produce certain medical records subpoenaed by the Attorney General. ALJ Sukovich found respondent's explanation of the circumstances which caused him to be unable to produce said records to be plausible, and we cannot conclude, on the record before us, that her determination was arbitrary, capricious or otherwise unreasonable.

Although we have modified the Initial Decision to include three additional findings of wrongdoing on Dr. Papel's part, we are convinced that the additional findings do not warrant the invocation of any further penalties beyond the substantial penalty recommendations made by A.L.J. Sukovich. We thus adopt the

recommendations made by A.L. J. Sukovich that respondent's license be revoked and that he be assessed costs and ordered to reimburse insurance carriers, and order: 1) that the license of respondent Leonard Papel, D.O., to practice medicine and surgery in the State of New Jersey be revoked: 2) that respondent be assessed and ordered to reimburse the following costs: \$8919.00 in investigative costs; \$694.00 for an initial investigative transcript; \$1543.50 for hearing transcripts, \$47,550 for attorneys fees and costs: and 55525 in expert witness costs; which total \$64,231.50⁴; and 3) that he make restitution to the insurance carriers which made payments for x-rays and scans in the amounts set forth at page 105 of the Initial Decision.

On the limited issue of penalty to be assessed, however, we modify ALJ Sukovich's recommendation that Dr, Papel be assessed a penalty of either \$220,000 (see Initial Decision, p. 105) or \$210,030 (see Initial Decision, p. 106 and 107), as we believe both suggested figures represent a miscalculation of penalty based on the formula and methodology recommended by the ALJ. We thus read ALJ Sukovich's decision to suggest that she thought the appropriate penalty assessment would have been for ne penalty to be assessed based on general allegations of the complaint; for a \$10,000 penalty to be assessed based on Dr. Papel's conduct related to the first of

⁴ We note that ALJ Sukavich apparently miscalculated the sum of the individual cost items she assessed; we thus *sua sponte* correct the cost assessment set forth in the Initial Decision from \$58,706.50 to \$64,231.50.

the thirteen named patients in the complaint; and for a \$20,000 penalty to be assessed (as a second offense) for each of the remaining twelve patients. Based thereon, we suggest that the penalty to be assessed against Dr. Papel should have been calculated to be a total of \$250,000, and, finding that penalty to be appropriate under the totality of circumstances in this case, order that the recommendation within the Initial Decision concerning the civil penalty to be assessed against Dr. Papel be modified to be an aggregate penalty of \$250,000.

WHEREFORE, it is on this ²⁴6 day of October, 2004

ORDERED:

1. The Initial Decision issued by ALJ Diana Sukevich is adopted in its entirety, with the following limited modifications:

a. The Board rejects ALJ's Sukevich's determination to dismiss the allegations that Dr. Papel violated N.J.A.C. 13:35-6.1 by signing reports with the designation "D.A.B.R." after his name. The Board instead finds that, by using said credentials, respondent Papel misrepresented himself as an individual holding a special credential in radiology -- namely, as a Diplomate of the American Board of Radiology -- and that said conduct violated N.J.A.C. 13:35-6.1.

b. The Board rejects ALJ Sukevich's determination to dismiss the allegations that Dr. Papel violated N.J.A.C. 13:35-6.1 by signing prescriptions and other printed material as "M.D., D.O.".

The Board instead finds that, by using said credentials, respondent Papel misrepresented himself as a graduate from an A.M.&-accredited allopathic professional school, and a holder of the title "M.D.", -- and that said conduct violated N.J.A.C. 13:35-6.1.

c. The Board rejects ALJ Sukovich's determination that Dr, Papel did not engage in gross malpractice when he prepared thirteen narrative reports for thirteen distinct patients listing purported "significant physical findings on initial examination" regarding the cervical and Lumbar spine areas and purported physical findings at the time of the last patient visit which were verbatim for each patient, had no basis in reality and which differed from the actual data documented in Dr. Papel's charts. The Board instead finds that such conduct constituted gross malpractice, and thus provides independent basis for disciplinary action against Dr. Papel pursuant to N.J.S.A. 45:1-21(c).

d. The Board modifies ALJ Sukovich's initial decision to make those "clerical" changes set forth in Appendix "A" to this decision.

2. The Board affirms In part and modifies in part A.L.J. Sukovich's recommendations of penalty, and hereby orders that:

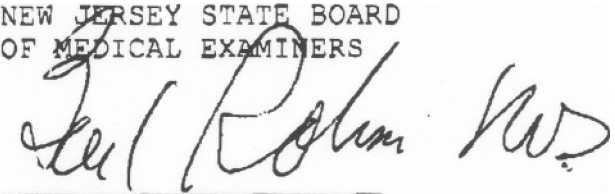
a. The license of respondent Leonard Papel, D.O., to practice medicine and surgery in the state of New Jersey is hereby revoked.

b. Leonard Papel, D.O. is hereby assessed and ordered to pay costs incurred in the prosecution of this matter in a total amount of \$64,231.50, and to make restitution to the insurance carriers which made payments regarding x-rays and scans in the amounts set forth at page 105 of the Initial Decision. Respondent shall make payment of the assessments imposed herein by certified check or money order made payable to the Board of Medical Examiners to be forwarded to Mr. William V. Roeder, Executive Director, State Board of Medical Examiners, 140 East Front Street, P.O. Box 183, Trenton, New Jersey, said payment to be made within thirty days of the date of entry of this Order, or pursuant to such payment schedule that may be accepted by the Board.

c. Leonard Papel, D.O., is hereby assessed a civil penalty in the amount of \$250,030, Respondent shall make payment of the penalty assessed herein by certified check or money order made payable to the Board of Medical Examiners to be forwarded to Mr. William V. Roeder, Executive Director, State Board of Medical Examiners, 140 East Front Street, P.O. Box 183, Trenton, New Jersey, within thirty days of the date of entry of this Order, or pursuant to such payment schedule that may be accepted by the Board.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By:


Bernard Robins, M.D.
Board President

Appendix "A"

The following "clerical" modifications to the Initial Decision of ALJ Sukovich have been made by the Board (~~deletions are crossed out~~; additions are underlined):

1. At page 1 -- Joan D. Gelber, Deputy Attorney General, ~~fer the Division of Consumer Affairs, Department of Law and Public Safety the Attorney General of New Jersey.~~

2. At page 4 -- He [Mittelman] ~~was Board certified in diagnostic radiology in 1994~~ is a Board-certified orthopedic surgeon.

3. At page 13 -- Handwritten entries containing range of motion data in the initial examination documents in the pertinent charts differ substantially from those reported in the FNRs for Mr. L.G. (L.G.), J.M., Mr. M.S., E.S., Mr. S.R. (S.R.), Mr. A.C. (A.C.), Mr. M.L. (M.L.), Mr. A.M. (A.M.), Mr. J.R. (J.R.), Ms. O.R. (O.R.), Ms. M.S., ~~and Mr. W.DS. (W.DS.)~~ and Ms. L.C.

4. At page 14 -- ~~Mittelman was retained by petitioner to conduct independent medical examinations of certain of the individuals in question.~~

5. At page 24 -- The date on the spinal US pertinent to ~~L.C. L.G.~~ is in "European terminology", the day of the month coming first.

6. At page 56 -- His [Ham Kim, M.D.] stated impression regarding the cervical spine was that there were ~~mild to general mild degenerative~~ changes at C3-4, with a small left posterior disc/osteophyte "complex" and no evidence of herniated nucleus pulposus."

7. At page 89 -- *In re Ernesto L. Rodriqueria*, ~~99~~ 93 N.J.A.R. 2d (BDS) 33, *aff'd* 95 N.J.R. 2d (BDS) 39 (Rodriqueria).

8. Appendix B at page 3 (after 3-62) --
Unidentified Certification of Attorney Fees dated May 7, 2003